Supreme Court, U.S.
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No. 98-1551

IN THE

Supreme Court of the United States

NURAINI B. ABIOYE,

Petitioner,

v.

SUNDSTRAND CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent, Sundstrand Corporation, has no parent companies and there are no publicly held companies that own 10% or more of its stock.

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REASONS FOR DENYING THE WRIT

The present Petition for Certiorari fails to demonstrate the necessity for exercise of this Court's extraordinary and discretionary power over this matter. Petitioner's arguments are, at their crux, a disagreement with the misapplication of an appropriate and consistently recognized legal standard relative to employment discrimination matters.

I.

THE LOWER COURTS PROPERLY APPLIED THE *McDONNELL DOUGLAS* EVIDENTIARY FRAMEWORK TO PETITIONER'S AGE DISCRIMINATION CLAIM.

Petitioner's primary argument in support of his request for certiorari in the present matter purports to be an assertion that the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit improperly utilized the *McDonnell Douglas*[1] evidentiary framework in analyzing Petitioner's claims of age discrimination. However, Plaintiff fails to articulate any specific legal basis for his assertions in this regard except to complain that this Court has not "formally" approved the application of *McDonnell Douglas* to a claim of age discrimination brought under the Age Discrimination in Employment Act.[2]

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1. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

2. Age Discrimination in Employment Act, 29 U.S.C. § 623 *et. seq.*

A. The Lack of "Formal" Approval of *McDonnell Douglas* in an Age Discrimination Claim Does Not Invalidate Its Use.

This court has recognized that the *McDonnell Douglas* burden shifting methodology is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978). The purpose of such method of proof is to help an alleged victim of discrimination overcome a number of proof problems inherent in a case which turns upon the intent of the alleged perpetrator. However, the use of such method of proof is not intended to and does not alter the basic burdens of proof imposed on a plaintiff in a civil action. The plaintiff still must prove intentional discrimination. Accordingly, there is no reason why such a "sensible, orderly" approach should not be used in an age discrimination matter.

Petitioner suggests that Justice Scalia's statement in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996), "[w]e have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it," is an indication of disapproval of the *McDonnell Douglas* formulation. This tortured reading of the *O'Connor* decision does not support Petitioner's position. Indeed a review of *O'Connor* and the cases cited therein demonstrates that the *McDonnell Douglas* method of proof is properly applied to an ADEA claim.

This Court cited *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993) as analogous authority for the assumption that *McDonnell Douglas* applied to an ADEA

claim. The *Hicks* Court assumed, without deciding, that *McDonnell Douglas* applied to 42 U.S.C. § 1983 actions. *Hicks*, in turn, cited as analogous authority *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), wherein this Court ruled that *McDonnell Douglas* applies to 42 U.S.C. § 1981 claims, explaining:

> We have developed, in analogous areas of civil rights law, a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue whether the defendant intentionally discriminated against the Plaintiff. We agree with the Court of Appeals that this scheme of proof, structured as a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," should apply to claims of discrimination under § 1981.

491 U.S. at 186 (citations omitted).

The chain of legal analogies back to *Patterson* (and *Furnco*), as cited in *O'Connor*, suggests that the "carefully designed framework of proof" is properly applicable to ADEA claims. The ADEA is an analogous area of civil rights law for which the *McDonnell Douglas* method of proof is a "sensible, orderly way to evaluate the evidence." There is, therefore, no need for this Court to grant Petitioner's request for a writ of certiorari simply to "formally" endorse this chain.

When the ADEA was enacted in 1967, its substantive prohibitions were derived *in haec verba* from the language of Title VII. *Lorillard, A Division of Loew's Theatres, Inc.*

v. Frances P. Pons, 434 U.S. 575, 584 (1978). The ADEA and Title VII, from the enactment of the ADEA, shared nearly identical prohibitions on discrimination and shared a common aim of preventing discrimination in the workplace. *McDonnell Douglas* was decided by this Court in 1973. By 1974, the federal courts, recognizing the similarities between Title VII and the ADEA, had begun to apply *McDonnell Douglas* to ADEA claims. *See, e.g., A.P. Wilson v. Sealtest Foods*, 501 F.2d 84 (5th Cir. 1974). Since that time, the circuit courts have evaluated claims under the ADEA using *McDonnell Douglas*. *See, e.g., Fisher v. Wayne Dalton Corp.*, 139 F.2d 1137 (7th Cir. 1998); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994); *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993); *Levin v. Analysis & Technology Inc.*, 960 F.2d 314 (2nd Cir. 1992); *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981); *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980); *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979); *Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d 58 (10th Cir. 1979); *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Petitioner does not provide any legitimate or reasonable basis for his position advocating abandonment of this uniform body of case law.

Petitioner points out that Congress has not taken the opportunity to amend the ADEA to authorize the use of *McDonnell Douglas*. More to the point, however, is Congress' decision not to prohibit such use despite making other amendments to the ADEA. Congress has in the past specifically amended discrimination statutes to address those matters on which they believed the case law was incorrect. For example, with the Civil Rights Act of 1991,

Congress amended Title VII in reaction to this Court's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See* 29 U.S.C. §§ 2000e-2(m), 2000e-5(g)(z). Accordingly, where Congress perceives a problem with the development of case law, it acts. Congress has not acted with regard to the application of *McDonnell Douglas* to ADEA claims, providing tacit support for its use.

B. There Is No Split of Authority in the Circuit Courts Regarding the Elements of the *McDonnell Douglas* Test.

Petitioner's next claim of error is that the lower Court erred in applying *McDonnell Douglas* by using the wrong pretext standard to find that he had not established a *prima facie* case of discrimination.[3] In support of this claim Petitioner asserts the existence of a split of authority among the Circuit Courts of Appeals as to the application of this Court's holding in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993). Petitioner suggests that some circuits continue to apply the pretext plus and pretext only standards

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3. Petitioner appears to confuse the *prima facie* and pretext standards and the lower court rulings on same. For purposes of clarification, the District Court found that Petitioner failed to establish a *prima facie* case of discrimination because he failed to present sufficient evidence to establish that he was performing according to Respondent's reasonable expectations. Appendix to Petition at 20a (hereinafter "Appendix") With respect to pretext, the District Court stated "there is simply no evidence of pretext in this case." Appendix at 21a. The Seventh Circuit agreed that Petitioner had not met his burden of proof on his *prima facie* case, but also went on to consider the issue of pretext. Appendix at 6a-7a. The Seventh Circuit held that Petitioner had failed to present sufficient evidence to establish a genuine issue of material fact as to pretext. Appendix at 8a.

despite this Court's express rejection of those standards and approval of the permissive pretext standard in *Hicks*.

Petitioner's argument, however, is fatally flawed by his misunderstanding of the holdings of the cases cited in his brief which he claims demonstrate a split of authority. A review of the cases cited establishes that, in fact, the circuits cited by Petitioner have all recognized this Court's dictate in *Hicks* and all apply the permissive pretext standard set forth therein.

Petitioner first cites to *Sheridan v. E. I. Du Pont de Nemours & Co.*, 100 F.3d 1061, 1067, 1078 (3d Cir.) (*en banc*), *cert. denied*, 117 S. Ct. 2532 (1997), and states that the Third Circuit has adopted the "pretext only" methodology. This is incorrect. In *Sheridan*, the Third Circuit expressly recognized the "permissive pretext" standard set forth in *Hicks*, stating that the elements of the *prima facie* case combined with a disbelief of proffered reasons allow, but do not require a finding of intentional discrimination. *Sheridan*, 100 F.3d at 1066-67. In the Third Circuit, a plaintiff can avoid summary judgment by producing sufficient evidence as to whether the employer's proffered reasons for the challenged employment action were false. *Id.* The Third Circuit noted the agreement of numerous other circuits, including the Seventh Circuit, on this issue.

With regard to the Fourth Circuit, curiously Petitioner cites to this Court's opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). While Petitioner repeatedly references the Fourth Circuit position, he fails to cite to any opinion by that court.

The Petitioner correctly notes that the Sixth Circuit has adopted the permissive pretext approach mandated by *Hicks*, citing *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997). However, Petitioner does not suggest how this standard differs from that of other circuits and, indeed, it does not. Thus, *Kline* provides no support for Petitioner's allegations of a split of authority.

Petitioner also claims to be able to avoid summary judgment under the standards applied by the Eighth Circuit, citing *Ryther v. KARE 11*, 108 F.2d 832 (8th Cir. 1997), *cert. denied*, 117 S. Ct. 2532 (1997), but again fails to actually identify the standard applied. A review of the case reveals that the standard is, in fact, permissive pretext. *Ryther*, at 836. This is, of course, the standard applied to Petitioner's case by the lower courts; he was unable to prevail under such standard.

Petitioner's representation of the Ninth Circuit standard as "pretext only" is simply incorrect. In *Warren v. City of Carlsbad*, 58 F.3d. 439, 443 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996), the Court noted that Plaintiff need produce very little evidence of discriminatory motive to avoid summary judgment on pretext, but held that the mere existence of a *prima facie* case was not enough. Indeed, the Court stated that a plaintiff "must produce evidence of facts that either directly show a discriminatory motive or show that the [employer's] explanation for his rejection is not credible." *Id.* at 443. The other Ninth Circuit case cited by Petitioner, *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 369 (1996), was brought pursuant to a state law anti-discrimination statute, not under a federal civil rights statute. However, the court reiterated the *Hicks* standard and affirmed a grant of

summary judgment because the plaintiff failed to offer "sufficiently probative" evidence of pretext. *Id.* at 918.

Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998), is cited by Petitioner as further evidence of a split in the circuits. Petitioner represents that the *Combs* court rejected the pretext plus standard and that he could have prevailed in the Eleventh Circuit. Again, Petitioner fails to actually indicate what the standard is — permissive pretext. What Petitioner fails to bring to this Court's attention is the *Combs* court's lengthy discussion of the rulings of various circuit courts on the pretext issue, noting that eight other circuits have interpreted *Hicks* to mean that evidence sufficient to discredit defendant's proffered reasons for his actions, when considered with plaintiff's *prima facie* case, is sufficient to allow, but not require, a finding of discrimination. *Combs*, 106 F.3d at 1535-36, citing cases from the Third, Fourth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits. The *Combs* court further noted that while the First and Fifth Circuits, in dicta, have made comments "arguably inconsistent" with the foregoing, the holdings of those courts were actually consistent with the rest of the circuits that had considered the issue. *Id.* at 1536, citing *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) and *Rhodes v. Gruberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996).

Finally, Petitioner asserts that the Seventh Circuit has adopted and used the pretext plus standard. Petition at 13-14. This is patently incorrect. The Seventh Circuit, as noted by the *Combs* decision, has expressly held that direct evidence of discrimination is not required at the pretext stage of the *McDonnell Douglas* method. Rather, discrimination can be inferred (but is not compelled) from a finding that

the employer's proffered reasons for their actions were spurious. *See, e.g., Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997); *Perdom v. Browner*, 67 F.3d 140, 146 (7th Cir. 1995). Accordingly, as the Seventh Circuit noted in its opinion in this case, in order to avoid summary judgment a plaintiff must provide evidence which would raise an issue of fact as to whether the employer's proffered reason was a lie. Appendix at 7a, citing *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1291-92 (7th Cir. 1997). This is the standard advocated by Petitioner (Petition at 14) and is consistent with that utilized by other circuit courts. Accordingly, Petitioner's attempt to create a conflict in the circuits necessitating this Court's involvement must fail.

II.

MISAPPLICATION OF *McDONNELL DOUGLAS* DOES NOT SUPPORT A GRANT OF THE PRESENT PETITION FOR CERTIORARI.

Interwoven in the present Petition for Writ of Certiorari is Petitioner's attack on the analysis performed by both lower courts utilizing the *McDonnell Douglas* burden shifting approach. (Petition at 12, 14-16)[4] This Court has long indicated that such an attack does not justify invoking this Court's powers to grant a petition for writ of certiorari. *See, e.g., National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 502-03 (1951) (stating that certiorari is granted only ". . . where there is a real and

4. Although not clearly stated, presumably Petitioner does not contest the applicability of *McDonnell Douglas* to his race and national origin discrimination claims. Accordingly, the sole basis for his request for certiorari on those claims is that the lower courts were wrong in analyzing his claim pursuant to McDonnell Douglas.

embarrassing conflict between the circuit courts of appeal" and should be denied where the petition is seeking only a "fair assessment of the record on the issue of unsubstantiality . . .") (citations omitted); *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175, 178 (1938) (holding that a writ of certiorari is not granted merely to review evidence or inferences drawn therefrom) (citations omitted).

Petitioner's arguments regarding misapplication of *McDonnell Douglas*, focusing primarily on various evidentiary rulings made by the District Court and affirmed by the Seventh Circuit, do not form a basis for this Court's grant of certiorari.

III.

THE LOWER COURTS WERE CORRECT IN NOT APPLYING A MIXED MOTIVE ANALYSIS TO THE PRESENT MATTER.

Petitioner's final argument is that the lower courts improperly failed to apply a mixed motive analysis to his case. Petitioner's argument in this regard is puzzling. A mixed motive analysis presumes the existence of a legitimate motive coupled with an illegitimate motive. Petitioner has not, at any time during the course of this litigation, conceded (even for purposes of argument) that any of Respondent's stated bases for its actions were legitimate.

Regardless, the lower courts properly articulated the mixed motive doctrine and properly declined to apply it to the present matter. The Seventh Circuit opinion explained

that a mixed motive analysis is applicable where the plaintiff is able to present either direct or circumstantial evidence that the challenged employment action was a result of intentional discrimination. Appendix at 8a-9a. If a plaintiff makes such a showing, the employer can limit its liability by proving that the same decision would have been made absent the discriminatory motive. *Id.* Again, as with Petitioner's arguments on pretext, he is challenging the court's conclusion under a properly stated and analyzed rule of law. Such a challenge is not an appropriate basis for seeking certiorari. *General Talking Pictures*, 304 U.S. at 178.

Petitioner failed to present either direct or circumstantial evidence sufficient to trigger a mixed motive analysis. Petitioner's claims of evidence of a "pattern of discriminatory treatment" are simply insufficient in this regard. None of the "evidence" asserted by Petitioner suggests, let alone mandates, the applicability of a mixed motive analysis.[5] Indeed, Petitioner cites to nothing more than a series of perceived slights that demonstrate no relationship to his race, national origin or age. Moreover, scattered examples of alleged unequal treatment, without more, simply do not provide any support for allegations of bias. *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1141 (7th Cir. 1997); *Kuhn v. Ball State*, 78 F.3d 330, 332 (7th Cir. 1996).

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5. Petitioner cites to two paragraphs contained in Alex Krinickas' affidavit at footnotes 18 and 23 of the Petition. These paragraphs were stricken by the District Court prior to its ruling on the motion for summary judgment. Petitioner makes no substantive arguments regarding the admissibility of such evidence.

Petitioner's reliance on the alleged unequal use of an assessment test is similarly misplaced. Petitioner failed to provide this Court with the following information: 1) that this event occurred in 1993, two years before his termination; 2) that the test was given to all engineers; 3) that the request to take the test was made by someone not involved in his termination; and 4) that the test was nullified based upon an investigation by Human Resources prompted by Petitioner's reports of inconsistent application.[6] This remote event simply does not support a finding of discriminatory motive sufficient to trigger a mixed motive analysis.

Additionally, use of the test was discontinued in 1993. Petitioner did not file a charge at that time and did not, in his charge or complaint in the present action, allege disparate impact. Accordingly, such a claim is untimely and not properly before this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that this Court deny the Petition for Writ of Certiorari in the present matter.

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6. R.20, Ex. 6, Abioye Tr. 140, 146.

Respectfully submitted,

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